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IN THE

Supreme Court of the United States

BRENDAN DOLAN, *et al.*,
Petitioners,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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The central failing in respondents' opposition is that it entirely sidesteps the Question Presented in the Petition. That question is whether a court may apply the filed rate doctrine to an agency that has acted outside its authority or in an arbitrary and capricious manner. In applying the doctrine to the New York Insurance Department's acceptance and approval of respondents' collectively-set title insurance rates, that is precisely what the Second Circuit did. It applied the doctrine even though the Insurance Department does not know what goes into these filed rates, and even though they are comprised of

costs that are unrelated to title insurance, explicitly barred under the Insurance Law, and otherwise lie outside the Insurance Department's jurisdictional reach. No other court has ever applied the filed rate doctrine in the face of such a regulatory breakdown.

But respondents do not address petitioners' question of agency authority and failure. Instead, they focus exclusively on the very different (and well-settled) question of whether the filed rate doctrine applies to a challenge to the reasonableness of filed rates. Nowhere is this more evident than in respondents' one-sided treatment of *Trans Alaska*. This Court made a clear distinction in that case between a challenge to the reasonableness of a filed rate and a challenge to an agency acting outside its authority. Respondents ignore that distinction entirely. They do not even acknowledge the clear limits it places on the filed rate doctrine.

The Second Circuit's *per se* application of the filed rate doctrine expands the doctrine further than any court to date by removing any limits to its application—mere agency filing and approval is enough. It is hardly in line with the "century" of filed rate decisions to which respondents point, or with the underlying purpose of the doctrine itself. The court's decision sets a particularly dangerous precedent in insulating agency failures and those—like respondents—who seek to exploit them. This case is far removed from the mundane application of the doctrine respondents pretend it is. It presents an important opportunity for the Court to speak to whether there are in fact *any* limits to this widely criticized doctrine which, as this Court recognized in *Square D*, has survived largely on *stare decisis* grounds alone.

1. RESPONDENTS DO NOT DISPUTE THAT COURTS ARE EMPOWERED TO DETERMINE WHETHER AN AGENCY HAS OVERSTEPPED THE BOUNDS OF ITS AUTHORITY

It is plainly within the province of courts to inquire "whether [an agency] has overstepped the bounds of its authority." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978). Respondents do not dispute this well-founded principle. Nor could they. It has been recognized by the Supreme Court for more than half a century. *See Leedom v. Kyne*, 358 U.S. 184, 188 (1958); *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 844 (1984); and other cases cited in Pet. at 10 and at 10 n.5.

Respondents also do not dispute the clear distinction laid out in *Trans Alaska* between assessing the reasonableness of filed rates versus assessing whether an agency has exceeded its authority in reviewing and approving them. Only the former inquiry is barred under the filed rate doctrine, not the latter. After all, the underlying rationale of the filed rate doctrine—deferring to agency authority and expertise—only makes sense and can only be applicable if the agency has properly exercised that authority and expertise in the first place.

2. RESPONDENTS MISCHARACTERIZE THE QUESTION PRESENTED IN THE PETITION

The Petition goes only to this latter question of agency authority. Yet, respondents do not address that question at all. Instead, they mischaracterize the relevant question here as one that concerns the

ability of a court to assess the reasonableness of filed rates. *See, e.g.*, Opp. at 3 ("this is a simple case that challenges the reasonableness of title insurance rates").

But this is a very different case. It involves an agency that has admitted that it does not see 85 percent of the costs that comprise the rates it approves; that has admitted that it has no statutory authority or ability to obtain this needed cost information; that does not know the services these rates actually cover; and that approves rates that violate the clear provisions of the governing law. Petitioners do not challenge these rates for their reasonableness. Rather, petitioners challenge the Insurance Department's authority in this regulatory context to accept and approve these rates at all.[1]

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[1] The Insurance Department's general authority over title insurance rates to which respondents and the Second Circuit point (Opp. at 17-19), does not give it the authority to accept and approve rates filed under these circumstances. Nor can respondents paper over this regulatory failure by pointing to a 1993 Insurance Department opinion which refers to the Department's supposed "intensive" review of respondents' rate filings. Opp. at 18. Without authority over title agents and their costs, this intensive review did not—and could not—cover the 85% portion of respondents' rates comprised of agency commissions. The Department's three rate decisions that respondents highlight (Opp. at 6-7, 18) likewise did not include any consideration of agency commissions. Therefore, they too fail to speak to the Department's lack of authority over this essential cost information and the Department's arbitrary and capricious conduct in accepting and approving respondents' rates without it.

3. RESPONDENTS' "CENTURY" OF FILED RATE CASES DID NOT DEAL WITH THE QUESTION OF AGENCY AUTHORITY

No other court has taken the filed rate doctrine this far. Respondents are therefore incorrect in their overarching contention that the Second Circuit's decision is "in line with nearly a century of this Court's case law and the decisions of other circuit courts across the country." Opp. at 1. None of the decisions in this "century" of case law involved a regulatory failure like the one at issue here. And none of them involved a challenge to the agency's authority to accept and approve the filed rates in the face of such a failure. They simply involved direct challenges to the reasonableness of the filed rates, an issue that is not before this Court.

Thus, respondents' litany of filed rate cases has no application here. This is particularly evident with the "numerous district and circuit courts across the country" that have purportedly applied the filed rate doctrine to bar title insurance challenges "almost identical" to petitioners' challenge here. Opp. at 14. None of these cases involved a challenge to agency authority. In fact, three of them made clear that had there been such a challenge, the filed rate doctrine would not have applied.[2] Furthermore, notably

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[2] *See* Opp. at 14-15 (citing *In re Pennsylvania Title Ins. Antitrust Litig.*, No. 08-01202, 2009 WL 2190669, at *9 (E.D. Pa. July 21, 2009) ("for a court to consider rates filed, and thus protected by the filed rate doctrine, the statutory scheme must provide the regulatory agency with authority to assess rates' compliance with statutory requirements for filed rates"); *McCray v. Fidelity Nat'l Title Ins. Co.*, 636 F. Supp. 2d 322, 331 (D. Del. 2009) (applying doctrine only after finding that insurance department "is fully empowered to regulate" the filed rates); *Winn v. Alamo Title Ins. Co.*, No. A-09-CA-214-SS, slip op. at 8-

absent from respondents' discussion of these supposedly identical cases is any mention of *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), the one title insurance case that actually did involve such a challenge. There, the Ninth Circuit refused to apply the doctrine to insurance departments that—like the New York Insurance Department here—lacked the ability and authority to assess the reasonableness of the filed rates.

4. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THOSE DECISIONS THAT DID DEAL WITH AGENCY AUTHORITY

The Second Circuit's decision directly conflicts with this Court's clear holding in *Trans Alaska* and elsewhere that no principle of agency deference can apply when the agency has acted arbitrarily, capriciously or outside its authority. Respondents cannot escape this precedent by suggesting that it does not apply in the filed rate context. Opp. at 19-20, 20 n.7. *Trans Alaska* clearly says that it does. So does the very purpose of the filed rate doctrine itself.[3]

9, 12 (W.D. Tex. May 14, 2009) (JA237-238, 241) (applying doctrine only after finding that insurance regime is "[n]otably" and "[s]ignificantly" subject to "comprehensive regulation")).

[3] Nor can respondents escape this limitation on the filed rate doctrine by arguing that petitioners raised it only "passing[ly]" below. Opp. at 19. They did not. Petitioners have raised *Trans Alaska* and the issue of agency authority at every stage and in every brief in this litigation. Equally unavailing is respondents' contention that an Article 78 proceeding provides a more appropriate forum. Opp. at 20-21. Petitioners have brought this case under the United States antitrust laws. The federal courts are the *only* forum where petitioners could have brought this case. Moreover, an Article 78 proceeding could not even be

The Second Circuit's *per se* application of the filed rate doctrine also directly clashes with those circuit court decisions that explicitly refused to expand the doctrine that far. Respondents' attempt to distinguish these cases "based on factors absent from this case" misses the point. Opp. at 22. The refusal by these courts to apply the doctrine flatly rejects the Second Circuit's decision that mere agency filing and approval are enough. In each of these decisions, the circuit courts looked beyond mere filing and approval to assess such issues as agency authority and whether the subject rates comported with the governing law.[4] The Tenth Circuit in *TON* even went so far as to hold that it would be "impossible" to apply the filed rate doctrine without first resolving these kinds of issues. 493 F.3d at 1237 n.15.

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brought against respondents. It can only be brought against the agency.

[4] *See, e.g., TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1234, 1237 (10th Cir. 2007) (refusing to apply doctrine because defendant's failure to provide "supporting cost data" prevented agency from determining compliance with governing law); *E&J Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1045, 1048-49 (9th Cir. 2007) (refusing to apply doctrine to filed rates outside agency's authority); *Sea-Land Serv., Inc. v. Danzig*, 211 F.3d 1373, 1380 (Fed. Cir. 2000) (refusing to apply doctrine because filed rate was "contrary to a statutory prohibition"); *Aberdeen & Rockfish R.R. Co. v. United States*, 682 F.2d 1092, 1102 (5th Cir. 1982) (refusing to apply doctrine because filed rate was "not filed and published in accordance with statutory or regulatory provisions"); *Security Servs., Inc. v. K Mart Corp.*, 511 U.S. 431, 440 (1994) (refusing to apply doctrine because filed rate "lacked an essential element").

5. THE SECOND CIRCUIT'S DECISION REPRESENTS AN UNPRECEDENTED EXPANSION OF THE FILED RATE DOCTRINE THAT SHOULD BE CORRECTED

The bottom line is that the Second Circuit's mechanical application of the filed rate doctrine has taken the doctrine well beyond where any court has taken it before, and well beyond its original design. No amount of respondents' tinkering can squeeze this case into a simple challenge to the reasonableness of respondents' filed rates. Nor can it reconcile the Second Circuit's decision with *Trans Alaska* and this Court's related precedent, or with the decisions of other circuit courts which refused such a rigid application of the doctrine. The fact is that if these other courts had adopted the *per se* approach the Second Circuit adopted here, they would not have refused to apply the doctrine as they did. Mere filing and approval would have been enough.

The Second Circuit's expansion of the filed rate doctrine is in particular need of this Court's attention and correction because of the extent of the agency failure the Second Circuit (and respondents) ignored. This is a failure that the Insurance Department has repeatedly acknowledged (and called for legislation to fix) and that the General Accountability Office confirmed in its 2007 study. Petition at 7-8. Respondents point to no precedent or purpose for applying the doctrine in this regulatory context. There is none. Permitting a regulated entity to exploit this kind of regulatory failure—outside of both antitrust and regulatory review—is certainly not what the filed rate doctrine was designed to accomplish. But if left

to stand, that is exactly what the Second Circuit's decision will do.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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